

Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS D1-27-21 OF 1995
AND D1-21-1 OF 1995

VINCENT NG J

12 JANUARY 2003

Civil Procedure — *Striking out* — *Action* — *Suit based on the doctrine of subrogation* — *Whether the fact of subrogation must be pleaded in the pleadings* — *Whether subrogation a material fact* — *Whether failure to plead subrogation fatal* — *Whether there was any necessity for legal firm to be appointed by the plaintiffs*

The plaintiffs were insured by the insurer under a Marine Open Policy against any loss or damage arising from all shippings and sendings on or after a specified date. To the order of the Secretary General of the first plaintiff, GEC-Marconi (Projects) Ltd of England loaded and shipped some equipment onboard the vessel MV 'Nedlloyd of Africa'. The plaintiffs alleged that during the course of unloading at North Port, Port Kelang, the equipment was damaged. Subsequently, the plaintiffs submitted a claim to the insurer for damages to their equipment. As directed by the plaintiffs, the insurer paid out the claim to GEC-Marconi Radar & Defence Systems, who in turn issued a letter of subrogation. Relying on the subrogation clause contained in the policy, the Insurer then, at their own expense, instituted this action against the defendant, using the plaintiffs' names. This was an appeal by the defendant against the decision of the learned senior assistant registrar, dismissing the defendant's application to strike out the plaintiffs' suit for the lack of authorization of Messrs Shook Lin & Bok ('the firm') to represent the plaintiffs. The crux of the issues were: (i) since the plaintiffs' suit was based on the doctrine of subrogation, whether the fact of subrogation must be pleaded in the pleadings; and hence, (ii) whether there was any necessity for the firm to be appointed by the plaintiffs.

Held:

- (1) The fact of subrogation was a material fact, based on the principles enunciated in *Bruce v Odham Press Ltd* [1936] 1 KB 697, [1936] 1 All ER 287 (CA). Since it was a material fact, it has to be pleaded and the failure so to plead was fatal to the suit, as it stood. The plaintiff had not applied to amend the statement of claim to reflect this fact (see pp 230I-231D); *The Asia Life Assurance Society Ltd v Chan Theng Kiang* [1995] MLJU 380, *UMBC v Palm & Vegetable Oil (M) Sdn Bhd* [1983] 1 MLJ 206, and *S&F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 followed.

- (2) Since the basis of the suit was subrogation and it was not pleaded, making it appear as though it was a straightforward and normal

- A proceeding between two opposing parties, it was trite that a solicitor who has not shown any authority to act for the party he purports to act (namely the Government of Malaysia here), the suit filed by him must be struck out (see p 231E-F); *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 and *William Jacks (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 followed.
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[Bahasa Malaysia summary]

- C Plaintiff-plaintiff telah diinsuranskan oleh penanggung insurans di bawah satu Polisi Marin Bebas terhadap apa-apa kehilangan atau kerosakan yang timbul daripada semua pengangkutan dan penghantaran pada atau selepas tarikh yang ditetapkan. Menurut arahan ketua setiausaha plaintiff pertama, GEC-Marconi (Projects) Ltd of England telah memuat dan mengangkut beberapa peralatan di atas kapal MV 'Nedlloyd of Africa'. Plaintiff-plaintiff mengatakan bahawa semasa pemunggahan dijalankan di North Port, Port Kelang,
- D peralatan tersebut telah rosak. Berikutan itu, plaintiff-plaintiff mengemukakan satu tuntutan kepada penanggung insurans untuk ganti rugi kerana kerosakan peralatan mereka. Sebagaimana yang diarahkan oleh plaintiff-plaintiff, penanggung insurans tersebut telah membayar tuntutan tersebut kepada GEC-Marconi Radar & Defence Systems, yang kemudiannya telah mengeluarkan sepucuk surat subrogasi. Berdasarkan fasal subrogasi yang terkandung di dalam polisi tersebut, penanggung insurans kemudiannya, di atas perbelanjaan sendiri, telah memulakan tindakan ini terhadap
- E defendan, dengan menggunakan nama-nama plaintiff-plaintiff. Ini adalah rayuan oleh defendan terhadap keputusan penolong kanan pendaftar, yang menolak permohonan defendan untuk membatalkan guaman plaintiff kerana tidak diberi kuasa yang mencukupi oleh Tetuan Shook Lin & Bok ('firma tersebut') untuk mewakili plaintiff-plaintiff. Intipati persoalan-persoalan adalah: (i) memandangkan guaman plaintiff-plaintiff berdasarkan doktrin subrogasi, sama ada fakta subrogasi perlu diplikan dalam pliding tersebut; dan justeru itu,
- F (ii) sama ada terdapat keperluan untuk firma dilantik oleh plaintiff-plaintiff.
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Diputuskan:

- H (1) Fakta mengenai subrogasi adalah satu fakta penting, berdasarkan prinsip-prinsip yang dinyatakan dalam *Bruce v Odham Press Ltd* [1936] 1 KB 697, [1936] 1 All ER 287 (CA). Memandangkan ia adalah satu fakta penting, ia harus diplidkan dan kegagalan untuk memplidkan membawa mudarat kepada guaman, seperti mana diputuskan. Plaintiff tidak memohon untuk meminda pernyataan tuntutan untuk menggambarkan fakta ini (lihat ms 230I-231D); *The Asia Life Assurance Society Ltd v Chan Theng Kiang* [1995]
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MLJU 380, *UMBC v Palm & Vegetable Oil (M) Sdn Bhd* [1983] 1 MLJ 206, dan *S&F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 diikuti.

- (2) Memandangkan asas guaman ini adalah mengenai subrogasi dan ia tidak diplidkan, dengan membuat ia kelihatan seperti ia adalah satu prosiding yang jelas dan biasa antara dua pihak yang membantah, ia adalah tetap bahawa seorang peguamcara yang tidak menunjukkan apa-apa kuasa untuk bertindak untuk satu pihak yang beliau katakan beliau bertindak bagi pihak tersebut (iaitu Kerajaan Malaysia di sini), guaman yang telah difailkan oleh beliau patut dibatalkan (lihat ms 231E–F); *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 dan *William Jacks (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 diikuti.]

Notes

For cases on striking out action, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5604–5615.

Cases referred to

Asia Life Assurance Society Ltd, The v Chan Theng Kiang [1995] MLJU 380 (folld)

Bruce v Odham Press Ltd [1936] 1 KB 697; [1936] 1 All ER 287 (refd)

City Tailors v Evans [1921] 91 LJKB 379 (refd)

Commercial Union Assurance Co v Lister [1874] 9 Ch App 483 (refd)

Edwards v Motor Union [1922] 2 KB 249 (refd)

Employers' Liability Assurance Corpn v Skipper and East [1887] 4 TLR 55 (refd)

Eso Petroleum Co Ltd v Hall Russel & Co Ltd [1988] 3 WLR 730

King v Victoria Insurance Co [1896] AC 250 (refd)

Lee Siew Kow, Re, decd [1951] MLJ 224 (refd)

Page v Scottish Insurance Corp [1929] 140 LT 571 (refd)

Philipps v Philipps (1878–1979) 4 QBD 127 (refd)

Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd [2000] MLJU 752 (refd)

S&F International Ltd v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (folld)

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd [1990] 3 MLJ 239 (folld)

UMBC v Palm & Vegetable Oil (M) Sdn Bhd [1983] 1 MLJ 206 (folld)

William Jacks (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555 (folld)

Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1961] 2 All ER 487 (refd)

A Legislation referred to

Marine Insurance Act 1906 s 79

Rules of the High Court 1980 O 6 r 3

Danny Yap (Lee Ong Kandiah) for the appellant/defendant in Civil Suit No D1-27-21 of 1995.

B *LL Lee (Shook Lin & Bok)* for the respondents/plaintiffs in Civil Suit No D1-27-21 of 1995.

Kevin Wong (Tommy Thomas) for the first defendant in Civil Suit No D1-21-1 of 1995.

C *Karamjit Kaur (H Karamjit & Co)* for the second defendant in Civil Suit No D1-21-1 of 1995.

Vincent Ng J: Before me is an appeal in Civil Suit No D1-27-21-95 ('the first suit') by the defendant against the decision of the learned senior assistant registrar dated 16 February 2001, dismissing the defendant's application to strike out the plaintiffs' suit for the lack of authorization of Messrs Shook Lin & Bok ('the firm') to represent the plaintiffs. It must be noted that the plaintiffs had also initiated another civil suit based on the same cause of action against Kelang Container Terminal Bhd and Kontena Nasional Bhd vide Civil Suit No D1-21-1-95 ('the second suit'). Both the actions were consolidated pursuant to a court order dated 9 February 1998.

E Although it was only the defendant in the first suit who had filed an application challenging the authority of the firm to act for the plaintiffs, all parties agreed that the decision in this appeal would also bind the parties in the second suit.

Background facts

F The plaintiffs were insured by Perdana Cigna Insurance Bhd ('the insurer') under a Marine Open Policy against any loss or damage arising from all shippings and sendings on or after a specified date (exh A encl 16B).

G To the order of the secretary general of the first plaintiff, GEC-Marconi (Projects) Ltd of England loaded and shipped some equipment onboard the vessel MV 'Nedlloyd of Africa'. The plaintiffs alleged that during the course of unloading at North Port, Port Kelang, the equipment was damaged.

H Subsequently, the plaintiffs submitted a claim to the insurer for Pound Sterling 176,987 for damages to their equipment. As directed by the plaintiffs, the Insurer paid out the claim to GEC-Marconi Radar & Defence Systems, who in turn issued a letter of subrogation dated 21 May 1997 (exh C encl 16B).

I Relying on the subrogation clause contained in the policy, the insurer then, at their own expense, instituted this action against the defendant, using the plaintiffs' names. In the present case, there does not seem to be any formal or legal assignment of the legal chose in action to the insurers (the court is not privy to this) since the latter did not sue in their own name (see *Employers' Liability Assurance Corpn v Skipper and East* [1887] 4 TLR 55 and *King v Victoria Insurance Co* [1896] AC 250 (PC)). There are also

instances of partial subrogation only, where the amount of loss exceeds the amount paid under the policy, in which case the assured may institute and conduct proceedings for the benefit of the insurers as well as of himself (see *Page v Scottish Insurance Corp* [1929] 140 LT 571 at p 576 (CA) and *Commercial Union Assurance Co v Lister* [1874] 9 Ch App 483).

The subrogation clause relied upon by the insurer reads as follows:

Subrogation: The Assured shall, at the request of these Insurers or their agents, assign and subrogate to these Insurers at the time of payment and to an amount not exceeding the sum paid by these Insurers, all their rights and claims against others and *permit suit to be brought in the assured's name* but at these Insurers' expenses ... (Emphasis added.)

The appeal

The crux of the issues before me can be gleaned from the written submission (encl 34B) of counsel for the plaintiffs, to wit:

- (1) since the plaintiffs' suit is based on the doctrine of subrogation, whether the fact of subrogation must be pleaded in the pleadings; and hence,
- (2) whether there was any necessity for the firm to be appointed by the plaintiffs.

At this juncture, I must observe that it was common ground that:

- (1) although this suit was wholly based on the principle of subrogation, as asserted by the plaintiffs, this point was not pleaded nor was there any particulars pertaining to subrogation adverted to in the statement of claim; and
- (2) aside from a letter issued by the federal counsel of the first plaintiff dated 7 June 1999 (exh D encl 16C), the firm failed to produce any letter from the Attorney General's Chambers confirming that it had been duly appointed to act for the second plaintiff, the Government of Malaysia.

The decision

Section 24(3) of the Government Proceedings Act 1956 ('the Act') provides that:

An advocate and solicitor of the High Court *duly retained by the Attorney General in the case of civil proceedings by or against the Federal Government* or Federal officer, or by the Legal Adviser, or, in the case of the States of Sabah and Sarawak, by the State Attorney General in the case of *civil proceedings by or against the Government of a State officer*, may appear as advocate on behalf of such Government or officer in such proceedings. (Emphasis added.)

If, as contended by the plaintiffs, the aforementioned section of the Act was inapplicable, as the action was based on the principle of subrogation, I would hold that the fact of subrogation is a material fact, based on the principles enunciated in *Bruce v Odham Press Ltd* [1936] 1 KB 697 at p 712,

- A [1936] 1 All ER 287 at p 294 (CA). On the topic of ‘material facts’, I need do no more than to quote the pertinent dicta from three cases, expressed as follows: ‘The basic principle is that the pleading must contain “a statement in a summary form for the material facts ... but not the evidence by which they are to be proved”.’ — per Murray Aynsley CJ in *Re Lee Siew Kow, decd* [1951] MLJ 224, ‘... the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.’ — per Cotton LJ in *Philipps v Philipps* (1878–1879) 4 QBD 127 at p 139; and, ‘The word “material” means necessary for the purpose of formulating a complete cause of action, and if any one “material” statement is omitted, the statement of claim is bad.’ — per Scott LJ in *Bruce v Odham Press Ltd and Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd* [2000] MLJU 752. It follows that, in the instant case, since it is a material fact, it has to be pleaded (see *The Asia Life Assurance Society Ltd v Chan Theng Kiang* [1995] MLJU 380, *UMBC v Palm & Vegetable Oil (M) Sdn Bhd* [1983] 1 MLJ 206, and *S&F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62), and the failure so to plead is fatal to the suit, as it stood. Here it is pertinent to note that, until hitherto, the plaintiff has not applied to amend the statement of claim to reflect this fact.
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E By analogy (though inapplicable here), O 6 r 3 of the Rules of the High Court 1980 imposes a mandatory requirement that where the plaintiff sues in a representative capacity, the writ issued must be endorsed with a statement of the capacity in which he sues.

F Since the basis of this suit was subrogation and it was not pleaded, making it appear as though it is a straightforward and normal proceeding between two opposing parties, it is trite that a solicitor who has not shown any authority to act for the party he purports to act (namely the Government of Malaysia here), the suit filed by him must be struck out (see *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 and *William Jacks (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555).

G I am keenly conscious of trite law that a third party who is being sued by an insurer legitimately exercising his right of subrogation has no right to challenge a settlement entered into between the insurer and an insured (see *King v Victoria Insurance Co* [1896] AC 250; s 79 Marine Insurance Act 1906; *Esso Petroleum Co Ltd v Hall Russel & Co Ltd* [1988] 3 WLR 730 at p 746; and *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1961] 2 All ER 487). The law notwithstanding, if indeed the plaintiffs’ action was based on the doctrine of subrogation, a careful perusal of the letter of subrogation dated 21 May 1997 (exh C encl 16B) showed that it was GEC-Marconi Radar & Defence Systems, rather than the plaintiffs, who issued the alleged letter of subrogation and who also received payment under the policy. Thus, as GEC-Marconi Radar was not an insured party the said letter dated 21 May 1997 is, in my view, not a proper letter of subrogation (see *Re Miller Gibb & Co Ltd* [1957] 2 All ER 266). Furthermore, no right of subrogation accrues to the insurers until they have paid under the policy and, in my view, this fact must be asserted in the pleadings (see *City Tailors v Evans*

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[1921] 91 LJB 379 at p 385 and *Edwards v Motor Union* [1922] 2 KB 249 at pp 254–255). And, unless they have paid before issue of the writ the fact that they have paid before the trial of the action in which they claim to be subrogated will not avail them (see *Page v Scottish Insurance* and *The Law of Insurance* by Raol Colinvau (4th Ed, 1979, Sweet & Maxwell Ltd). Unfortunately, in the present action, as it appears to be the contention that neither the court nor the defendants need to know from the pleadings the alleged subrogation basis of the action, the fact whether the insured or GEC-Marconi Ltd was paid before issue of the writ was not pleaded.

Aside from this, the said letter, giving the insurer the alleged right to sue in the plaintiffs' name, was dated 21 May 1997 whereas the suit by the insurer in the plaintiffs' names was instituted in 1995. The discrepancy in the dates seriously undermined the very foundation of the plaintiffs' suit as the action was premature.

Notwithstanding the above, there is the eventual question of the costs of this suit. Costs are normally awarded against the party or parties on record. This being so, should the costs in this suit be ordered against the Government of Malaysia without their participation in the proceedings through unequivocal authorization to act on their behalf, it would work injustice on them in the event the indemnity on costs (if any) turns out to be unenforceable.

Conclusion

After having studied the pleadings, affidavits and written submissions from both sides and based on the aforesaid reasons, I allow the defendant's appeal with costs and order that the plaintiffs' Suit No D1–27–21–95 be struck out. Consequently, as agreed earlier, Suit No D1–21–1–95 is accordingly stuck out with no order as to costs.

Order accordingly.

Reported by Peter Ling

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